

THE ARIZONA Fiduciary

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Changes to Arizona Trust Law Effective January 1, 2004

*By Craig Hunter Wisnom,
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Estate and Trust Law*

The Uniform Trust Code will become effective in Arizona as of January 1, 2004, bringing with it the most comprehensive codification of trust law in Arizona's history, which includes a number of significant changes of which practitioners and clients should be aware. The law adopted by Arizona includes some changes to address some of the more controversial issues or to tailor the provisions to Arizona's need.

The impetus for a Uniform Trust Code reflects the fact that revocable trusts are becoming an increasing popular and prevalent mode of estate planning, in many situations replacing Wills as the means for transferring property at death. When coupled with the realization that in many states, there were neither many statutes nor much case law to address issues that arise in administration and litigation of trusts, the need for a more definitive statement of trust law became clear.

The Uniform Trust Code, as adopted by Arizona, encompasses 10 Articles in Title 14, and while even a general survey

of this extensive law is beyond the scope of this Article (the Act is over 19,000 words, and includes 94 Sections), in addition to the codification of common law principles, the following are a few of the most important changes and elements of the act:

The Code generally creates default provisions subject to modification by the terms of a trust, however, there are certain mandatory provisions that may not be drafted around, including the general duties of a trustee, the power of a court to adjust unreasonably high or low trustee compensation, and the duty to provide notice and respond to requests for information and accountings to "qualified beneficiaries." (A.R.S. §14-10105).

The provisions of the Code are generally retroactive, based upon reasoning that it would be unworkable to have two separate bodies of trust law. (SB 1351, Section 15).

The Uniform Trust Code not only specifically defines beneficiaries, but separate classes of beneficiaries to specify when and how notice must be given, who must join in settlement agreements, and who must give consent to certain actions. (A.R.S. §14-10103). "Qualified Beneficiary" is an important definition in this arrangement.

The Uniform Trust Code clarifies the ability of various individuals to represent the others, not only in litigation and court

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THE ARIZONA Fiduciary

The Quarterly Newsletter of the Arizona Fiduciaries Association, Inc.—An Affiliate of the National Guardianship Association

Fall 2003 – Volume 10, Number 4

Arizona Fiduciaries Association, Inc.

AFA is a non-profit organization whose purpose is to provide structure, guidance, training and continuing education for public and private fiduciaries in Arizona.

AFA Membership

AFA welcomes individual memberships regardless of profession. Annual dues are \$60.00 payable each October 1.

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Changes to Arizona Trust Law Effective January 1, 2004

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matters, but in nonjudicial settlement agreements, including the ability of parents to represent minor and unborn children, a conservator for a protected person, and for virtual representation in the case of beneficiaries with identical interests. (A.R.S. §14-10301, and §14-1404-1408).

The ability to enter into binding nonjudicial settlements without court approval in many situations, which especially in conjunction with clarification regarding representation of beneficiaries, allows more actions to be taken without the additional expense of a court hearing. (A.R.S. §14-10111)

The requirements for notice to beneficiaries are expanded and clarified detailing when and to whom a Trustee must provide notice and provide information as requested. (A.R.S. §14-10813). As noted above, some of these requirements are mandatory. For any irrevocable trust as of the effective date, required notice must be sent out within 60 days, March 1, 2003. (SB 1351, Section 15). The latter is probably the most immediate requirement that clients and practitioners will need to comply with.

In a substantial departure from existing law, any trust which is not expressly irrevocable, is subject to revocation or amendment by the Settlor. (A.R.S. §14-10602). This provision, however, is specifically not subject to retroactivity. If a trust does not specify a means of amendment, or if the means is not specified to be the exclusive way to amend the trust, it may be amended by a Will devising the property or referring to the trust, or by any other method manifesting clear and convincing evidence of intent.

Where a Trustee has provided a beneficiary a report adequately disclosing the existence of a possible claim for breach of trust, and where the beneficiary was informed of the time to commence an action, the beneficiary's right to bring a claim expires within one year. (A.R.S. §14-11005). This makes full disclosure of any potential issues, as well as the existence of this statute of limitations advisable on all reports.

A court may award, based on general principles of justice and equity, attorneys' fees for any party, from any other party or the trust itself. (A.R.S. §14-11004).

A trust can be created orally, if proven by clear and convincing evidence. (A.R.S. §14-10407).

The act sets out very specifically the situations and circumstances where a trust can be modified or revoked by a court, or in certain circumstances, through agreement alone, including (a) the modification or termination based on consent of the Settlor and all beneficiaries, regardless of material purpose (A.R.S. §14-10411(A)), (b) modification or termination based on consent of all beneficiaries if consistent with the material purposes of the trust (A.R.S. §14-10411(B)), (c) modification of a trust based on changed circumstances (A.R.S. §14-10412), (d) modification to achieve a settlor's tax objectives (A.R.S. §14-10416), and (e) modification of the unambiguous terms of a trust to conform with the settlor's intent if the terms were affected by a mistake. (A.R.S. §14-10415).

Additional information and resources are available at: <http://www.azbar.org/Sections/ProbateTrust/home.asp>
Craig Wisnom can be reached at craig.wisnom@azbar.org or 520-575-5555.

AFA Ethics Committee Update

By Francine Saccio, RG

The AFA Ethics Committee wants to encourage members to use the Listserv to share issues that you are dealing with as a Professional Fiduciary that may be posing an ethical dilemma. It has become clear that this kind of sharing is very helpful. The listserv will give everyone another avenue of communication among colleagues in the profession.

How to Order "What Is A Fiduciary" Booklets

This is the booklet AFA has produced for several years for the general public. It describes the work and services provided by Arizona's fiduciaries. We have already distributed more than 10,000 booklets since 1999.

Copies of the new Third Edition of the booklet are available for distribution to your fan clubs and potential clients. As usual, there is a "Compliments Of" box on the back cover, where you can stamp the name of your firm for a bit of advertising.

If you are a for-profit business (or expect to be making money someday from your business), the price is 50 cents per booklet to cover our printed costs, plus \$5.00 for shipping and handling. If you are a public agency or non-profit organization, booklets are available at no cost to you.

To order, if you are a government or non-profit agency, e-mail or mail your request to Allan Rouse and like magic, your order will appear in your mailbox. If you are a for-profit business, mail your order to Allan with check made out to "AFA" for 50 cents per booklet plus \$5.00 for packaging and postage. Feel free to order large quantities.

Send Requests and Payments to:

Allan Rouse
PROBATE RESEARCH
P O box 1502
Sun City, AZ 85372
Phone: 623-434-0330
allanrouse@earthlink.net



55 and Counting!

Yes, that's how many of us are on the AFA's new listserv as of Labor Day!

There are no fees to join the listserv and it is very simple to sign up and use. You receive and send messages right along with your regular e-mail.

Here's how to sign up: In your e-mail open your "Create Mail" or "New Message" window. In the "To:" line type **join-azfid@lists.elder-law.com** and be sure you get in the dashes, all the dots and spell everything correctly. You don't need a subject or anything else, just click on "Send." The List automatically registers the e-mail address you used to send the message. Shortly, you will receive an e-mail confirming that you are now on the List.

The same e-mail will also provide instructions on how to send and respond to messages, so save it for future reference. For example, to send a new message to the List, in a "New Message" window, in the "To:" line, type **azfid@lists.elder-law.com** (watch your dots and dash again), then type in a subject, your message and click on "Send."

Psst—did you know that AFA's website is at www.maricopa.gov/pubfid/afa.asp?



Comments from the AFA President

By Patricia Ian, RG, CLA, Certified Fiduciary, Yavapai County Public Fiduciary

You'll notice an article in this issue about the International Guardianship Conference held in Berlin last spring that was attended by two of our AFA/NGA members, Peter Santini and Francine Saccio. This is very timely because the First International Conference on Law and Aging will be held this year November 6 and 7th at the Stetson University College of Law near Orlando, Florida. They claim to be bringing together the world's leading experts on legal issues of aging in recognition that aging issues cross borders, ethnicity and cultures. The organizers of the conference, AARP and Stetson University College of Law, apparently feel that countries can learn much from each other with regard to how we treat our elder population. Although they don't state specifically that guardianship issues will be addressed, they refer to "judicial involvement in elder issues" as one of their agenda items. We are fortunate to have so many leaders in the area of our profession in Arizona.

Speaking of leaders, the Education Committee of AFA has put together another great conference, "Fall Into Knowledge", to take place in Tucson on November 13 and 14th. The program is included with this newsletter so that you have plenty of advance notice. Attendance at our conferences has been increasing dramatically, so you may want to make your reservations at The Radisson as soon as possible to ensure room availability. The day and a half long conference will provide 8.25 hours of continuing education, 4 hours of which can be counted as AOC-sponsored training towards the 10-hour requirement, and 4.25 towards the non-AOC sponsored ten-hour requirement for continuing education.

One of our main conference speakers, Charles Arnold, Esq., will be discussing implementation of the new requirements under A.R.S. Sections 14-5303 and 14-5304, the effective date of which is September 18, 2003. The main requirements of the bill are as follows:

- 1) The type of guardianship requested must be listed on the petition, and you must state that other alternatives have been explored;
- 2) If general guardianship is requested, the petition must outline why a limited guardianship is not appropriate; if a limited guardianship is requested, the specific powers must be noted in the petition;
- 3) The Court is required to encourage the development of maximum self-reliance and independence of incapacitated persons when appointing guardians;
- 4) For the Court to order the appointment of a general or limited guardian, it must be shown the person's needs cannot be met by means less restrictive than guardianship, including technological assistance.

As certified fiduciaries we have been aware of the need to find the least restrictive setting and to maximize the potential for independence of our clients as provided in A.R.S. Sec. 14-5312, but now the Courts are required to actively pursue whether the needs of a person can be met by any means other than guardianship. In essence, some of the most important elements of our Code of Conduct are now Arizona law.

Lastly, the AFA collectively and members individually responded to the Fiduciary Certification Unit of the AOC with requested modifications to the proposed changes to Code Sections 7-201 and 7-202. If you have signed up for our listserv, you would have received a copy of AFA's requested modifications. The requested modifications will be studied by AOC staff and the Fiduciary Advisory Commission, and the Code changes will be prepared for presentation to the Arizona Judicial Council in October. We'll keep you informed of the process by means of the AFA listserv.

The International Guardianship Network Conference Berlin, Germany April 6 - 9, 2003

By Francine Saccio, RG

The International Guardianship Network has 132 members from 19 nations and all continents. It is an independent group with no political or religious connections. It is the mission of the group to provide information and networking opportunities for guardianship professionals worldwide.

The first International Guardianship Network (IGN) conference was held in Berlin, Germany April 6 through the 9, 2003. There were 35 guardianship professionals who attended representing 7 nations, Australia, Israel, Germany, Switzerland, Austria, Canada, and the United States. It was the first international conference in the guardianship field, which was organized in English and German.

The representatives from the United States included Texas with Judge Pat Ferchill and Paula Conley presenting from the program in Fort Worth; New Jersey with Peggy Dervitz and Dr. Shashi Jain presenting on limited guardianship; Arizona with Francine Saccio and Peter Santini presenting on the NGA Code of Ethics and Standards of Practice. Greg Mullowney, from the Louisiana Guardianship Program assisted with this presentation. Alaska was also represented with Betty and John Wells presenting on the Court Investigator and that role in Guardianship in the USA.

Jochen Exler-Konig and Francine Saccio were the co-chairpersons of the conference. Jochen is the gentleman who created the idea of the Network in 2001 and with the support of others around the world moved forward with the conference planning. Jochen has a degree in Social Work from ASFH University of Applied Science in Berlin. Jochen, Francine and others in attendance assisted in translations throughout the conference. Two of the presentations were given in German.

Highlights of the presentations will be shared in this article. Jochen began the conference with his presentation of Guardianship in Berlin. There are three guiding principles of the German Guardianship law. The first principle is the principle of necessity, which bars appointment if the person can manage independently or with the support of other social services. The second principle is the principle of self-determination which requires the guardian to follow the wishes of the supported individual as long as the well-being of the person is not likely to be impaired, and which recognizes that the person's well being includes the possibility to lead a self-determined life to the highest possible degree. The third principle is the principle of rights preservation which means that the appointment of a guardian does not affect the legal capacity of the person to make decisions of a personal nature. Every person with a mental disability has fundamental rights as the rights to vote, to marry, and to make a will. Overall, what those of us in the USA realized is that because of the social-democratic philosophy in Germany, many more individuals are under guardianship than there would be in the United States.

Francine Saccio and Peter Santini also presented the first afternoon of the conference. The highlight of this presentation was the discussion that ensued regarding the vignettes that were presented. There were comments made by most of the attendees on how they would resolve the ethical dilemmas. The suggested solutions were very universal regardless of what country we were practicing in.

Judge Ferchill and Paula Conley presented on A Systems Approach to Guardianship Management. In Texas probate courts, a guardianship may be initiated in two ways. An attorney may file an application for guardianship on

behalf of a client or the court itself may initiate a guardianship proceeding for an incapacitated person pursuant to the Texas Probate Code Ann. 683. Once the guardianship is investigated and a guardian is appointed, the Probate Code mandates that the court monitors the established guardianship. Judge Ferchill has created a guardianship department that uses a systems management approach to meet the mandates for guardianship in the probate code. The guardianship office is staffed by a Court Investigator who is an attorney, Assistant Court Investigator and Program Manager who are both Licensed Master Social Workers and a Guardianship Auditor who has many years of experience working with probate and guardianship issues.

On Monday April 7, 2003 Jochen scheduled the group to take a riverboat cruise on the Dahme River. Individuals with disabilities had built the riverboat. The boat was enclosed and thank goodness for that because it was cold, windy and snowy. The boat and crew took us to a non-profit company, which employs persons/wards with disabilities. We toured the company and then they provided a great lunch for us. The rest of that day was spent touring central Berlin and historical areas.

On Tuesday April 8, 2003 the morning began with a presentation by Loris Barnes, Chris Finkelstein and Barbara Carter from Victoria, Australia. Adult guardianship within Australia is governed by state legislation. In Victoria, the relevant legislation is the Guardianship and Administration Act of 1996. All orders are made for a time-limited period, the maximum time allowable is three years, but the average time for a guardianship order is twelve months. At the end of the designated time, a further hearing is held to reassess the order, to consider whether the order can be revoked or there is a need for continuation, and whether there needs to be any changes to the terms of

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The International Guardianship Network Conference Berlin, Germany April 6 - 9, 2003

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the order. The Public Advocate is a statutory appointee and heads an organization of approximately 40 paid employees and 600 volunteers, whose mission is to promote the rights and dignity of people with disabilities, to strengthen their position in society, and to reduce their exploitation, abuse and neglect. When the Public Advocate is appointed as guardian for a represented person, the role and authority is delegated to one of the 20 statutory guardians with his Office or one of the 50 volunteers who act under his authority as Community guardians.

One of the other duties within this office is what is referred to as an independent third person program, which provides an independent person to assist police officers when they interview a person with a disability such as a suspect, victim, or witness to a crime. All attendees thought that this program was very unique and most helpful.

Margot Prinz and Ingrid Nagode gave the next presentation from Austria. In Austria, legal reforms in 1984 led to the development of limited guardianships. The Austrian law on guardianship has also been credited with influencing the reforms in Germany in 1992. Austria has four professionally staffed non-profit organizations, which provide guardianship services for adults with mental handicaps. The organization that presented has professional and volunteer guardians and takes care of 1154 wards/clients. Professional guardians support 588 wards and volunteer guardians support 566 wards. Austrian guardians, called Sachwaite, are responsible for all person matters, management of the estate, financial management and medical treatment. Patient Advocates, called Patientenanwälte, are also appointed for each committed mental patient. Every Austrian adult with a mental handicap who cannot fend for him/herself has the possibility to get a guardian from the Guardianship Court. At first, the judge has a talk with the potential ward about the guardianship. Then the judge

appoints a temporary guardian till the end of the guardianship procedure and a medical expert who describes the potential ward's medical and mental condition. In a hearing with the potential ward, the medical expert and the temporary guardian, the judge decides on appointing permanent guardian or not.

The next presentation was given by Dr. Israel Doron on Aging in the Shadow of Law: Adult Guardianship in Israel. Dr. Doron is a Lecturer and on the faculty of Health and Welfare Studies at Haifa University, Haifa, Israel. Dr. Doron presented research he completed of guardianships in Israel from 2000 through 2002. It was a quantitative study, based on a random sample that included 523 court cases requesting legal guardianship for adults due to impaired legal competence, according to the Legal Competence and Guardianship Act of 1962. The most outstanding finding is that in the current design of the protective formal procedures a decision for guardianship is made without hearing the ward's position based on a medical document that the ward never saw, and thus had no recourse to oppose or object. The ward is not informed of the existence of the petition, its content, or that it has been submitted to the court. The elderly population is denied the right to enter a plea, does not have recourse to defense, and the findings. In none of the case studies did the ward have legal representation. Also, added to these findings is research completed by Heinik and Solomish, 2001 who reviewed the content and essence of the medical certificates on which the guardianship petition rely. They found that in most cases, a full cognitive mental test was not performed and in many cases, many clinical aspects were not checked, and the available scientific assessment tools were not used. These are only the highlights of the research completed. Dr. Doron's conclusion, of course, states that there is an urgent need in Israel to carry out extensive reform in the realm of civil legislature on the issue of legal guardianship for adults and the elderly.

Armin Eberli from Switzerland gave the next presentation, The Revision of the Swiss Guardianship Law: From an Adult Guardianship Law to an Adult Protection Law. Armin is a social worker and he

works as a Public Guardian in Olten/Switzerland. He is also a member of the board of the Swiss Guardianship Association. This association was founded in 1913 and has 450 members. Armin informed the attendees that through history to the present time, only man was permitted to be guardians. Their Guardianship Law has not been revised since 1907. The new reforms that are now proposed will probably take until 2008 to pass because everyone in Switzerland must vote on the changes. There are 26 states and four different languages spoken in this country. They feel that discrimination against wards could be reduced or avoided by introducing the new legal term Adult Protection instead of Guardianship.

Betty and John Wells, from Anchorage, Alaska next spoke about the role of the Court Investigator in guardianship proceedings in Alaska and the United States. We all know what an important position this is to the process.

The final presentation of the conference was given by Peggy Dervitz, MSW, Regional Director for the Bureau of Guardianship Services, New Jersey Division of Developmental Disabilities and Dr. Shashi Jain, Ph.D. licensed psychologist. They presented on the New Jersey model for limited guardianship.

For more detail regarding the presentations given at this conference, you may purchase the Reader titled International Adult Guardianship Presentations from the International Guardianship Network Conference in Berlin. I believe the cost is \$20 or \$25 Euro and you may E-mail Jochen with your request at bvtreptow@aol.com.

Overall, this conference experience was wonderful. Even with the language differences, we were able to communicate with our international colleagues during the conference and socially at our dinners and breakfasts. The connections we have made will be sustained. One of the most important aspects of these connections is that if anyone has a case that involves overseas property or other matters, we now have people in the profession who we may contact for assistance. I encourage those of you who have not registered with the International Guardianship Network, to do so. There is no cost and

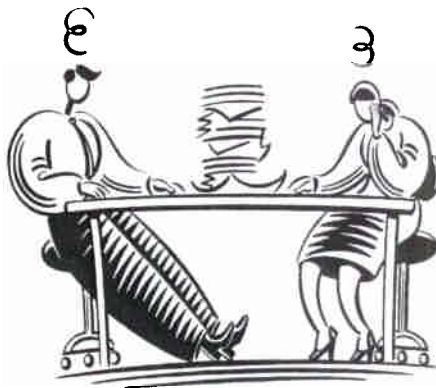
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**The International Guardianship
Network Conference
Berlin, Germany
April 6 - 9, 2003**

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you will be able to e-mail others around the world whenever you need assistance or just want to learn more about how other programs function.

Finally, I want to say that our German colleagues were very gracious and made our stay in Berlin comfortable and welcoming. They could not control the weather, however, and we did experience those cold, windy, snowy days when we were out and about Berlin. For someone coming from Arizona, it was quite invigorating!



Have you Moved?

Have you recently moved or changed jobs, changed your phone number, email address, etc.? If so, we would like to hear from you so that we may keep a current a database of AFA members. Please send your new information to:

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P.O. Box 1892
Sun City, Arizona 85372-1892
(623) 977-6310
E-Mail:
pjohnston@cfssuncity.com

Quality of Life



MARK YOUR CALENDARS NOW FOR THE 2003 NGA ANNUAL CONFERENCE

HOTEL INFORMATION:

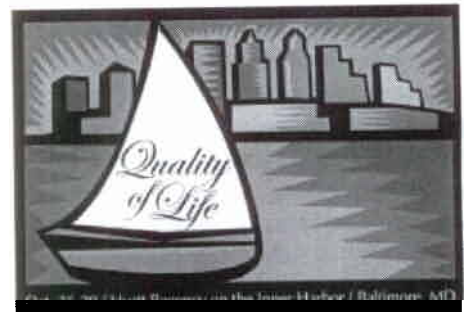
Hyatt Regency Inner Harbor;
300 Light Street; Baltimore, MD 21202;
(410) 528-1234 Phone, (410) 685-3362 Fax.

NGA GROUP ROOM RATE:

\$162.00 Single/\$167.00 Double Occupancy, plus tax.

To reserve your room at the group rate, just call the hotel directly at (410) 528-1234 and be sure to mention that you are with the National Guardianship Association. Reservations are on a first-come, first-served basis and the group rate cannot be guaranteed after **August 22, 2003**.

Navigant International is available to assist you with airline reservations in and out of Baltimore, car rentals, and other travel arrangements. (Service fees will apply.) For more information just call (800) 229-8731.



harboringhope

2003 NGA Annual Conference

ARIZONA FIDUCIARIES ASSOCIATION, INC.

Membership Application

Instructions: Please complete this application and return to the Membership Chairman at P.O. Box 1892, Sun City, Arizona 85372, with a check or money order payable to "Arizona Fiduciaries Association, Inc. Annual dues are \$60. Per Article Ten, Section 2 of the By-Laws, "Dues shall be payable in advance of the first day of October each year. Dues of a new member shall be prorated from the first day of the month in which such new member joins AFA." Example: Member joining on May 5th will pay a prorated membership of \$25 for the 5 months remaining prior to October 1st. Annual dues are reduced to \$45 for members of the National Guardianship Association.

Type of Applicant: ☐ *Public Fiduciary ☐ **Private Fiduciary ☐ Individual

| | | |
|----------------------------|--------------|-------------------------|
| Name: _____ | | |
| Address: _____ | | Apt. _____ |
| City: _____ | State: _____ | Zip: _____ |
| Mailing Address: _____ | | |
| City: _____ | | State: _____ Zip: _____ |
| Phone: _____ | Fax: _____ | E-Mail: _____ |
| Place of Employment: _____ | | Phone: _____ |

Years as a fiduciary in Arizona: _____ Other Locations: _____

Briefly describe your background in the fiduciary field:

Briefly describe any specialized training related to fiduciary work:

Have you ever been removed for cause as a guardian, conservator or personal representative? If yes, please explain:

I hereby attest that I am an adult citizen of United States of America. I have not been convicted of a felony and have not been found civilly liable in any action that involved fraud, misrepresentation, material omission, misappropriation, theft or conversion. I further certify that the facts detailed in this membership application are true to the best of my knowledge.

Date: _____

Signature of Applicant

* Public Fiduciary – An individual appointed by a county board of supervisors to represent the interests of persons or decedents' estates in need of guardianship, conservatorship or public administration for whom there is no person or corporation qualified and willing to act in such capacity.

** Private Fiduciary – A person who, for a fee, serves as a court-appointed guardian or conservator for one or more persons who are unrelated to the fiduciary. A person who, for a fee, serves as a court appointed personal representative and who is not related to the decedent, is not nominated by a power conferred in a will or is not a devisee in the will.

Arizona Fiduciaries Association, Inc.

An Affiliate of the National Guardianship Association

P.O. Box 422, Tucson, AZ 85702-0422



Calendar of Events

SEPTEMBER 18 - 21, 2003

Geriatric Care Managers Fall Conference: "Set Sail for Success."

Hyatt Regency at Inner Harbor, Baltimore, MD

Contact the GCM program managers at Management Plus 520-325-1055

OCTOBER IS NATIONAL GUARDIANSHIP MONTH

OCTOBER 3, 2003

Behavioral Health Services & Older Adults: Trends, Issues & Solutions

Doubletree on Alvernon 445 S. Alvernon Way, Tucson, AZ 8:00 a.m. to 4:00 p.m.

For more information, call 520-318-6949

OCTOBER 19 - 25, 2003

National Health Care Decisions Week

OCTOBER 23, 2003

Free Legal Advice Day

To provide seniors with free legal advice in the areas of wills, trust and

estates Sponsored by: The State Bar of Arizona Sun City Lodge #72 18810 N.

107th Ave. (at Union Hills in Peoria/Sun City, AZ)

OCTOBER 26 - 29, 2003

National Guardianship Association Annual Conference

Hyatt Regency Inner Harbor, Baltimore, MD

For more information, contact the NGA office at 520-881-6561 or at the NGA

website: www.guardianship.org

NOVEMBER 13 - 14, 2003

AFA Fall Meeting & Conference: "AFA Harvest: Fall into Knowledge."

Radisson Hotel City Center, 181 W. Broadway, Tucson, AZ

For reservations: 520-624-9963

For Program Information: Peter Santini 520-740-5483